SUPREME COURT, U. S.

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No. 909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

EDWARD LIMPERIS, TRUSTEE
IN BANKRUPTCY OF PROCESS-MANZ PRESS, INC.
Petitioner,

v.

A. J. ARMSTRONG CO., INC.
Respondent.

REPLY BRIEF OF PETITIONER

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Respondent's brief in opposition is more an extended argument on the facts than it is a discussion of the reasons involved in the exercise of this Court's certiorari jurisdiction.

Respondent re-asserts the argument, rejected in both the majority and dissenting opinions of the Court below, that it has not had a day in court (Br. pp. 10, 18, 28). On the contrary, the Court below noted respondent's refusal to participate in the complete hearing afforded by the referee and held that it was not required to participate but was entitled to take the risk that if it was wrong on the jurisdictional issue, judgment would be rendered against it accord-

ingly. See App. to Pt. pp. 8-9, 369 F. 2d at 517. The portions of the record which respondent quotes (Br. pp. 6-7) amply support the conclusion of the *entire* Court below that respondent has had its day in court.

The controlling question here is whether respondent, who asserts the status of an adverse claimant, may oust the bankruptcy court of *all* jurisdiction as to *all* assets of the bankrupt, including assets which the Court below held respondent "obviously had no right to possess" (App. to Pet. p. 12; 369 F. 2d at 519), and require the trustee to initiate a plenary suit under §23 of the Bankruptcy Act as to *all* such assets—even though the claim to *all* the assets is derived from one set of documents. Respondent argues that §23b of the Act (11 U.S.C. §46b) is also involved (Br. pp. 1-2). Section 23b does not become pertinent until disposition is made adversely to petitioner of the issue of summary jurisdiction under §2a(7). See 2 COLLIER, BANKRUPTCY ¶23.03 (14th ed. 1966).

Respondent denies the jurisdiction of the bankruptcy court in cases where a lienholder has seized both mortgaged assets and free assets of a bankrupt and defies the court by refusing to disgorge the free assets. In *Louisville Trust Co.* v. *Comingor*, 184 U.S. 18 (1902), cited by respondent (Br. p. 26), the adverse claimant voluntarily disgorged assets to which he had no claim.

Respondent's assertion of a claim to the property excluded from the chattel mortgage (*i.e.*, the work in process and inventory) and the property of reclamation creditors in which the bankrupt had an equity (R. 260-61, ¶¶ 9 and 10), which claim was inseparable from respondent's claim to the other assets of the bankrupt, compelled the referee, in the exercise of summary jurisdiction conceded to him by the Court below, to conduct a hearing into the merits of

respondent's claim thereto. Stated otherwise, by refusing to disgorge the assets which the Court below held it "obviously had no right to possess," respondent required the bankruptcy court to conduct a hearing on the merits concerning respondent's claim thereto. The majority held this exercise of summary jurisdiction proper.

Under well established principles of *res judicata* and collateral estoppel, the referee's adjudication in the exercise of his conceded jurisdiction is binding upon respondent as to the remaining assets in a plenary proceeding. *Katchen* v. *Landy*, 382 U.S. 323, 334 (1966); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 375 (1940); *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). In denying *res judicata* effect to the valid exercise of summary jurisdiction as to a subsequent plenary proceeding, the majority opinion of the Court below conflicts in principle with the decisions of the three Circuits cited in the petition (Pet. p. 7), each of which gives *res judicata* effect to a prior summary proceeding.

The majority opinion thus concludes that unless a referee's adjudication binds all property over which an adverse claimant asserts a possessory right, it has no *res judicata* effect—*even as to assets which the claimant "obviously had no right to possess."* No precedent is cited for this holding. The clear error in this holding alone is of a magnitude sufficient to warrant the exercise of this Court's supervisory powers over lower federal courts to prevent a miscarriage of justice. If permitted to stand, the majority opinion below may become a model for protracted administration by fragmentation.

Respondent's basic argument is that even if summary jurisdiction does exist as to a part of the assets which it claims, still a plenary suit should be required since it

provides a more convenient forum in view of the multiple claims made by respondent against third parties. The filing of the plenary suit was made at the direction of the referee to toll the statute of limitations. (R. 1075.) The plenary suit sought relief in the alternative under Federal rule 8(a), relief that is unnecessary if summary jurisdiction exists. The Court below held that it did exist in part, a holding which respondent does not challenge and which under well established rules is *res judicata.* See *supra,* p. 3. Respondent's argument of a more convenient forum thus misses the mark, especially since the presence of petitioner is not required for the adjudication of any claims which respondent may have against any third parties. Reinstatement of the judgment of the District Court would leave respondent entirely free to pursue any and all claims it may have against third parties. Repetition of the voluminous evidence in the record here would be unnecessary. See Dissenting Opinion in Court below, App. to Pet., p. 14; 369 F.2d at 519.

Contrary to respondent's contention (Br. p. 15), the petition does not urge that the long established distinction between summary and plenary jurisdiction be judicially abolished. The petition urges only that in the interest of expeditious judicial administration, in a day that requires rapid movement of litigation through the courts, unnecessary suits be removed from the dockets of the courts. This can be done within the confines of the Bankruptcy Act as it presently stands.

Petitioner does not, contrary to respondent's argument (Br. p. 16), attribute responsibility for the delay and waste herein to the majority of the Court below. Petitioner attributes it to the confused state of the law. Petitioner asks this Court to remove this confusion and

clarify hearing procedure in bankruptcy cases. The confusion exists because of certain language of this Court in *Harrison* v. *Chamberlin,* 271 U.S. 191 (1926), and the provisions of Federal Rule 12, principally paragraphs (b) and (d). Petitioner asks that this Court re-examine *Harrison* v. *Chamberlin* in the light of Federal Rule 12. If the waste in this case can be attributed to any factor other than a confused state of the law, it is attributable to respondent. Respondent prevented the liquidation of the estate more than three years ago, at a time when three fourths of the waste to date could have been avoided. See Pet., pp. 5-6, 13.

Respondent attempts to undermine petitioner's position on the merits of this case by impugning the integrity of one of petitioner's counsel. See Br. pp. 12-13. This attempt is irrelevant to the question of whether certiorari should be granted, is based upon statements not of record, and is unprofessional. Respondent refers to an attorney-client relationship between Louis Kessler, a partner of one of the petitioner's three attorneys, and Lester Neumann, a former stockholder of the bankrupt.* This innuendo was first raised by respondent in its brief in the Court of Appeals and was obviously ignored by that Court. It should be ignored by this Court. Intrusion of such matters into the case on the appellate level is merely an attempt to lead this Court into irrelevancies and can have no bearing on the rights of the numerous creditors of this estate. Whatever claim, if any, respondent may have against Louis Kessler can and should be litigated separately from the propriety of respondent's dealings and misdealings with the bankrupt.

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* The only record reference cited by respondent, R. 672, shows merely that *respondent* was aware of an attorney-client and business relationship between Kessler and Neumann on November 21, 1962.

Respondent's brief is noteworthy for its failure to mention the conflict between the majority opinion's holding that the issue of lawfulness of possession is for the plenary suit, and the several decisions of this Court, as well as of other Circuits, holding that this issue is for the bankruptcy court. To permit such authority to stand can only create additional confusion in the already complex subject matter of a bankruptcy court's summary jurisdiction.

The petition adequately demonstrates that clarification of procedural law in bankruptcy is needed, and needed urgently, in order to reduce waste involved in litigation of the issue of summary jurisdiction.

Respectfully submitted,

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